Disposal Investment, Inc. d/b/a Silver State Disposal Company *and* Gary W. Hillyer. Case 31-CA-12260

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 31 May 1983 Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We agree with the judge's finding, contrary to our dissenting colleague, that General Foreman Melvin Moore unlawfully interrogated employees at a company-held meeting. The relevant facts are as follows: The Respondent's shop employees and refuse collectors have for several years been represented by Teamsters Local 631. In preparation for a new collective-bargaining agreement to succeed an agreement which was to expire on 10 June 1982, employee Gary Hillyer and another employee were designated by Union President Hal De Mille to solicit employee proposals at the facility. At the time the Union had no steward for the unit.

On 21 March 1982 a union meeting was held at the union hall to discuss such employee proposals. During the meeting Hillyer made certain proposals which prompted Union Secretary Jim Rice to inquire whether Hillyer was asking for a "little bit too much." Hillyer replied, "To hell with Richie Isola [the Respondent's owner] and the rest of those assholes." None of the Respondent's supervisors was present at this meeting.

Later that evening, when the employees arrived at work Moore called night-shift employees into the lunchroom for a meeting. The judge noted that Moore had been a long-term member of the Union and had remained a member after becoming a supervisor. The record further indicates that prior to this meeting Moore had been informed in a manner not alleged here to be unlawful that Hillyer apparently had directed the above-quoted epithet at him during the union meeting earlier that day. At the start of the meeting Moore asked the employees whether they had designated Hillyer as their representative. These employees denied they had and Hillyer confirmed this. Moore followed this inquiry by asking Hillyer, "What's this shit, you calling me an asshole." Hillyer responded that he had not called Moore this name but if "the shoe fits wear it."

As we recently reaffirmed in *Daniel Construction Co.*,[3] the "test of whether an employer's interrogation of an employee violated Section 8(a)(1) is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of rights guaranteed them by the Act." Under this standard we are convinced that an unlawful interrogation occurred. Here, as found by the judge, Moore, who happened to be a union member, was acting in his capacity as a supervisor when he questioned the employees as to whether they had designated Hillyer to be their representative. Further, there can be no doubt that the employee meeting was called by the Respondent and that attendance was mandatory for, according to Hillyer's credited testimony, when he arrived for work that evening he was instructed by his shift supervisor, Donny Quinta, to attend the meeting. The Respondent has offered no explanation as to why such a meeting was necessary, although Moore himself testified that the "whole purpose of the meeting" was to find out if Hillyer was the shop steward. Moore also told employees that he had heard how Hillyer had referred to him at the union meeting earlier that day. Thus it appears that the meeting was designed to ascertain what had transpired at the union meeting, and that Moore's opening inquiry was not the rhetorical "passing inquiry" that our dissenting colleague suggests. Under these circumstances and in light of the Respondent's other unlawful conduct which occurred at this meeting and is set forth in the judge's decision, we conclude that Moore's questioning of employees violated Section 8(a)(1) of the Act.[4]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The parties stipulated that Carl Carlton Jr. and Donny Guinta were supervisors within the meaning of Sec. 2(11) of the Act.

[3] 264 NLRB 569 fn. 1 (1982), citing *Florida Ambulance Service*, 255 NLRB 286 fn. 1 (1981).

[4] Member Zimmerman finds, contrary to the judge and his colleagues, that the Respondent sought to create the impression that its employees' activities were being kept under surveillance when, during that same meeting and in response to a question by Hillyer, Moore stated that he knew what went on at the union meeting. Following his statement, Moore informed Hillyer that he was being assigned to the more onerous job of cleaning steam docks, a reassignment that violated Sec. 8(a)(3) and (1) of the Act. In view of the unlawful interrogation that occurred during the meeting and the unlawful reassignment of Hillyer to a less desirable

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ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Disposal Investment, Inc. d/b/a Silver State Disposal Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN DOTSON, dissenting in part.

Contrary to my colleagues, I would not find that the Respondent unlawfully interrogated employees at the company meeting. Here General Foreman Moore's opening inquiry regarding whose authority Hillyer had spoken during a union meeting that day was clearly directed at a report that Hillyer had called him an "asshole." Although expressed with a degree of personal pique over the derogatory nature of the reported remark, the passing inquiry to employees made by a long-term union member was essentially rhetorical in nature, and presents insufficient evidence that this opening inquiry by Moore tended to restrain or interfere with the exercise of employees's statutory rights. Accordingly, I would dismiss this allegation of the complaint.

I agree with the decision in all other respects.

job immediately after Moore's comment to Hillyer, Member Zimmerman finds it reasonable to assume that employees would view Moore's remark as something more than a mere comment by a union member, as suggested by the judge. Rather, the evidence points to the fact that Moore's comment was meant to create the impression of surveillance and under these circumstances was violative of Sec. 8(a)(1) of the Act.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. This matter was heard by me on March 24, 1983, at Las Vegas, Nevada. The charge was filed by Gary W. Hillyer, an individual (Hillyer), on June 21, 1982,[1] and the complaint was issued by the Acting Regional Director for Region 31 of the National Labor Relations Board (NLRB or Board) on August 20. The complaint alleges that Disposal Investment, Inc. d/b/a Silver State Disposal Company (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, by the conduct and actions of its agents and supervisors. Respondent filed a timely answer in which it denied the alleged wrongdoing.

The General Counsel and Respondent were represented at the hearing by counsel and all parties were provided with the opportunity to present evidence, to make argument, and to file briefs. On the entire record in the case,[2] including my observation of the demeanor of the witnesses, and my careful consideration of the General Counsel's argument at the hearing and Respondent's posthearing brief, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits that it is a Nevada corporation with an office and principal place of business in Las Vegas, Nevada. Respondent is engaged primarily in the business of collecting and disposing of refuse and garbage. Respondent's gross revenues annually exceed $500,000 and it annually sells goods and services valued in excess of $50,000 to business enterprises within the State of Nevada which meet one of the Board's jurisdictional standards other than indirect outflow or indirect inflow. Respondent admits, and I find, that it is an employer within the meaning of Secion 2(2) of the Act engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. I further find that it would effectuate the purposes of the Act for the Board to assert its jurisdiction over the labor dispute involved in this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

Teamsters, Chauffeurs, Warehousemen and Helpers Local 631, IBTCWHA (Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background, Pleadings, and Issues*

As noted above, Respondent is engaged in business primarily as a garbage and refuse collector in Las Vegas. Respondent's employees (both its shop employees and its collectors) have been represented for a number of years by the Union and the instant dispute arose out of activities by Hillyer in connection with preparation for the 1982 negotiations between Respondent and the Union for a new collective-bargaining agreement to supplant the agreement scheduled to expire on June 10.

Hillyer was hired by Respondent as a diesel mechanic on November 7, 1978, and was continuously employed until his discharge on April 13. During the times relevant here, Hillyer's immediate supervisors were foremen Carl Carlton Jr. and Donny Guinta. Carlton and Guinta's immediate supervisor was General Shop Foreman Melvin Moore.

The complaint alleges that Moore—in the course of an employee meeting on March 22 at Respondent facility—interrogated employees as to whether Hillyer was their spokesman or representative; created the impression that employee activities on behalf of the Union were being kept under surveillance; and threatened to discharge, suspend, impose more onerous conditions, or take other unspecified reprisals all in connection with employees' activities on behalf of the Union. In addition, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by assigning Hillyer to the more onerous work of cleaning the steam racks on March 22, and by discharg-

[1] All dates refer to the 1982 calendar year unless specified otherwise.
[2] Errors in the transcript have been noted and corrected.

ing him on April 12. Respondent denies that it engaged in any unlawful conduct.

As framed by the pleadings, the issues to be resolved here are:

1. Whether Respondent violated Section 8(a)(1) of the Act by Moore's conduct at the March 22 employees meeting.

2. Whether Respondent violated Section 8(a)(3) of the Act by assigning Hillyer to clean the steam racks on March 22.

3. Whether Respondent violated Section 8(a)(3) of the Act by discharging Hillyer in April.

B. *Chronology of Relevant Events*

In the spring of 1982, representatives of the Union were preparing for the upcoming contract negotiations with Respondent. In approximately February, Hal De Mille, a business agent for, and president of, the Union, requested the assistance of Hillyer and another employee, Glen Cox, in collecting proposals from employees in and about the shop.[3] De Mille held several lunch break meetings with the employees and encouraged them to pass along their contract ideas of proposals to Hillyer and Cox. In the meantime, Hillyer personally contacted ideas or proposals to Hillyer and Cox. In the meantime, Hillyer personally contacted several of the mechanics and employees in the nearby welding shop. Altogether Hillyer talked to all the mechanics on the noon to 8 p.m. shift, several of the night-shift mechanics after his transfer to that shift, 6 to 8 welders, and about 20 to 25 of the drivers and pitchers. Hillyer collected ideas submitted to him by Cox and those employees he contacted and drafted a list of proposals which he submitted to De Mille.

Hillyer was an open and motivated advocate on behalf of the employees. De Mille visited the shop on several occasions during this period and would often seek out Hillyer. According to Hillyer, several employees were disappointed over the outcome of the last contract but were unwilling to do anything about it because many employees perceived that the steward at that time had, in effect, gone out on the limb—so to speak-and had been severely harassed as a consequence of his activities. Hillyer explained his inspiration as follows:

> [T]he company—Silver State Disposal—wanted to give the mechanics and other employees less than what we actually had. And I wasn't going to settle for less . . . . I felt that if I was going to get less that I should try myself . . . at least, put an effort in—to know that I tried—to where, if we did get less, at least I wouldn't be saying to myself "Damn, I should have tried." I didn't want to be able to say that. I wanted to try—to know that, at least, I did try to get something for myself, as well as the other employees.
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> So, therefore, we started working on the contract proposals earlier [so] we'd have more time to gather . . . ideas . . . [W]e started a little bit earlier so we could . . . get all these ideas on paper . . . go through them and find out what was good, what they would or wouldn't take.
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> We had some in there that we knew that they would throw away, but we put them in there on purpose . . . because we knew that they would. It would be something for them to discard; we knew we were'nt going to get it. So, we put [some items] in there with the other things that we really did want. And, so, it took us a little while to . . . get it all together, and get what we actually wanted, to where we had a lot of time to think about what we'd want, or what we'd like to have—and put things in there that we knew that they would throw away—where we can actually have a chance of shooting for the stars and maybe, getting a piece of the earth, you know what I mean? It is basically what it comes down to.

There is evidence that certain of Respondent's supervisors reacted unfavorably to Hillyer's newly acquired militancy. Both General Foreman Moore and Shift Foreman Carlton frequently broke up conversations between Hillyer and other employees. In addition on February 10, Hillyer was transferred to the night shift (8 p.m. to 4 a.m.) under the supervision of Shift Foreman Guinta. Hillyer vehemently protested his transfer to the night shift asserting that there were several mechanics with less seniority who should have been transferred ahead of him. Hillyer filed a grievance with the Union and a charge with the Board concerning his transfer but both were eventually voluntarily dropped. While working on the night shift, Hillyer was told by Guinta that "they want to fire [you]. You're making waves. You're causing trouble." Guinta told Hillyer that he had refused his supervisors' requests to fire Hillyer.[4]

The process of collecting ideas from employees for contract proposals culminated in a meeting on Sunday March 21, at the union hall. De Mille testified that 131 employees (including Hillyer) attended the meeting which was held between 10 a.m. and noon. Hillyer recalled that De Mille and Jim Rice, the Union's secretary-treasurer (chief executive officer), attended on behalf of the Union.[5] At that time several employees in the audience discussed their ideas concerning the contract negotiations between the Union and the Respondent. After several employees had spoken out, Hillyer arose and verbally set forth several proposals he had accumulated as a result of his own thoughts and his discussions over the past 1-1/2 months with other employees. One of Hillyer's proposals was that an employee be hired to clean the steam docks, an area where the garbage trucks are steam cleaned with the resultant accumulation of substantial quantities of garbage. When Hillyer completed his remarks, Rice inquired as to whether or not Hillyer thought he was asking for a "little bit too much." Hillyer

[3] At the time the Union had no steward for the unit involved here because it was unable to secure a volunteer for that post.

[4] This finding is based on Hillyer's uncontradicted testimony. Guinta did not testify nor was his absence explained.

[5] De Mille's recollection was uncertain as to Rice's attendance. Hillyer—as will be noted below—had a clear and definite recollection of Rice's attendance which I credit on the basis of the total circumstances and Hillyer's convincing demeanor while testifying.

retorted, "Who are you working for—Silver State Disposal or the people that belong to the union?" Hillyer continued "What do you mean 'asking too much'? We have to ask this." Rice, who apparently was not convinced of Hillyer's strategy, responded by saying that he still thought Hillyer was seeking too much from the Company. Hillyer then replied, "To hell with Richie Isola [Respondent's owner] and the rest of those assholes."

Hillyer arrived for work at approximately 7:50 on the evening of March 21. When he proceeded to clock in, Hillyer was handed a letter by the time office employee. The letter, signed by Moore, advised Hillyer that he was being transferred from his job as a mechanic to a garbage truck job. Hillyer testified that the garbage truck jobs paid less than his mechanic's job and that it was regarded as less desirable work. Hillyer proceeded from the time office to the employee locker room where he read the letter to the other assembled mechanics and displayed it to some of those present. Hillyer asserted to those present that the letter had resulted from his union activity.

As the letter did not specify his job assignment on the garbage truck—driver or pitchman (the worker assigned to dump the garbage from the customer's container into the truck)—Hillyer left the locker room and went to Moore's office. Present there with Moore was Foreman Guinta. Hillyer asked Moore what he was "trying to pull." Moore's immediate response was that he did not understand what Hillyer was talking about but, after reading the letter, Moore remarked simply, "You weren't supposed to get this letter yet." Guinta then told Hillyer to go back to the lunchroom for an employee meeting. Hillyer said that Moore kept the letter.[6]

According to Hillyer, the employee meeting (attended by the night-shift mechanics) began about 8 p.m. and lasted for 30 to 45 minutes. Moore started the meeting by addressing the assembled mechanics from the end of one of the lunchroom tables. Hillyer's description of the meeting is as follows:

> And he come in and he said, "Did any of you people designate Gary Hillyer here to go in and represent you at this union meeting?" And they all said, well, no, not really. And I said, "Hey, I didn't go in there representing the mechancis on this shift—basically, at this union meeting. I went in there for myself and for some of the mechanics that I talked to on Carl Carlton's shift, which is from noon to 8:00." I said I went in there for myself. They didn't have to ask me to go in.
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> I said, "I didn't see any of you people in there." And there weren't. There weren't any night shift mechanics in there in the union meeting on March 21st. And Mel Moore wasn't there.
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> There was two mechanics off of Carl Carlton's shift, one welder—two welders—and myself, that I can remember—that were actually there. And the rest were drivers and pitchers and what not.
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> And he says, "What's this shit you're calling me an asshole?" I said, "Mel Moore, I did not call you an asshole, but if the shoe fits wear it." I said, "I did not call you an asshole." I said, "How in the hell did you know what was going on anyway, because you weren't at the meeting?" And he said, "If you think we're going to hire somebody to clean the steam dock, you're mistaken, because from now on that's your permanent job. When you come to work, that's the first thing you do is clean that steam dock, and it better be clean." And he says, "And when you perform your work any more, it better be up to standards, or we will take action against you." He said, "You better be on your toes."
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> He, then told everybody there that if they were caught talking to me, they would get—along with myself—three days off without pay. Before the meeting was over, he then told me, he says, "I'll be working here a hell of a lot longer than you will be." And I said, "Okay, whatever." And, basically, it was over and done with by then.
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> [H]e told me also that I would no longer be working on any more engines at all. He said, "Your job is no longer to work on engines. I don't want you touching any more engines." He says, "You're going to be doing springs and things like that." He says, "You'll never touch another engine." I said, "Fine."

In the days following Moore's March 21 meeting, Hillyer's first job when he reported to work each day was to hose the garbage off the steam dock with water. Hillyer's clothing would often become wet completing this assignment and during the remainder of the shift his work place was confined to the out-of-doors in the "bone yard," the area where Respondent's expended rolling stock was stored. Hillyer worked alone in the bone yard removing engines and transmissions, repairing springs, and otherwise cleaning up. Although Hillyer acknowledged that he had occasionally worked in the bone yard before, he had never been continuously assigned to work there alone. According to Hillyer, the bone yard was a garbage fill area and, on occasion, there was still some shifting of the ground so that it was dangerous when he was required to be working beneath a vehicle on jacks.

In addition, Hillyer testified without contradiction that, a day or two after the March 21 employee meeting, Guinta informed him that Isola and Moore did not want him parking his car inside the fence anymore. Thereafter, Hillyer was not permitted to park his car inside the fenced area as were other employees.[7] Employees had

[6] Respondent denied the existence of any such letter at the hearing when the General Counsel called for the letter pursuant to a subpoena duces tecum. However, as no inquiry was made of either Moore or Guinta concerning this matter, I credit Hillyer's uncontradicted testimony concerning the letter and the events surrounding it.

[7] The General Counsel did not allege this conduct to be unlawful.

been given permission to park their personal vehicles inside Respondent's fenced shop area after numerous incidents of vandalism and burglaries involving employee vehicles parked outside the fence.

At some unspecified time between March 21 and April 8, Hillyer was reassigned to Carlton's supervision on a shift which began at 11 a.m. and ended at 7 p.m. Hillyer's duties were not altered; he continued to be isolated in the bone yard.

About midway through his shift on Thursday, April 8, Carlton told Hillyer to drive one of Respondent's diesel trucks to Sierra Detroit Diesel Company (Sierra), the dealership at which the truck was purchased, for warranty repairs. Hillyer complied. While Hillyer was awaiting the completion of the work being performed on the vehicle, he engaged Gene Poplin, Sierra's foreman, in light conversation. Among other things, Poplin said that Hillyer told him that he was thinking about calling in sick the following day. Hillyer could not remember making such a remark but he did not deny that such a remark could have been made. In addition, Hillyer spoke to William "Bones" Codington, a Sierra mechanic with whom he was acquainted. After Poplin completed his work on the vehicle, Hillyer returned it to Respondent's shop and apparently completed the remainder of his workday.

The following day, April 9, Hillyer telephoned Respondent and advised Carlton that he would be absent from work that day because he was sick. There is no dispute about the fact that Hillyer's call was timely, or that he otherwise followed all the proper procedures for reporting his absence from work. Likewise, there is no contention that Hillyer was frequently absent from work with illnesses or for other reasons.

Carlton assumed full responsibility for the decision to terminate Hillyer. He claimed not to have consulted with any other official of Respondent before deciding to terminate Hillyer. According to Carlton's version of the events which led to Hillyer's discharge, sometime after Hillyer's telephone call on April 9, he was speaking by telephone with the shop supervisor at Sierra, Dennis Willis. Carlton claimed that, in this conversation, Willis remarked that he did not know how a guy could continue working as long as Hillyer had in view of the "bull" he was taking. Carlton responded, "Well I don't know . . . [b]ut he didn't come in today." Willis allegedly remarked that he knew Hillyer would not be at work that day which prompted Carlton to inquire further. In response, Willis supposedly told Carlton that Poplin "had heard some other guys talking about it was a holiday weekend and he [Hillyer] was going to call in sick that day—to take the day off—and that was the day he called in sick." Subsequently, Carlton acknowledged that the "holiday weekend" aspect of the foregoing testimony was, in effect, his own supposition and that there was no mention by Willis of a holiday week end." Nevertheless, Carlton claimed that he thought about the matter for a couple of hours and decided to discharge Hillyer for calling in sick that day. In essence, Carlton testified that in the past he had been generous in giving Hillyer time off for personal difficulties and he was upset that Hillyer would lie to him about being sick on April 9 as an excuse to take the day off. It is clear that the sole basis for Carlton's conclusion that Hillyer had lied to him about being ill on April 9 was his telephone conversation with Willis. Carlton acknowledged that he did nothing in terms of investigating the accuracy of Willis' assertion about Hillyer allegedly stating that he was going to call in sick on April 9 and there is no evidence that Carlton did anything to confirm the conclusion which he reached that Hillyer was lying to him about his reasons for being absent from work that day.[8] In this connection, Carlton admitted that he had no recollection of asking Hillyer whether, in fact, he was ill or had seen a doctor on April 9.

Hillyer testified that he did not report to work on April 9 because he was having pain from a back injury. According to Hillyer, the pain is recurrent and, on occasion, his back becomes so painful that he cannot bend over. Hillyer testified that he frequently seeks medical help for his back problem and, on Saturday, April 10, he visited his doctor for treatment. Dr. Hays Turney, a Las Vegas chiropractor, corroborated Hillyer's testimony. Turney testified that Hillyer visited him for treatments which he rendered on April 10 and 15. Hillyer was provided with a disability slip by Dr. Turney on April 10 (which is in evidence) but he was not requested to produce any evidence of illness before he was terminated nor is there evidence that it was Respondent's policy to routinely require a verification of an illness when employees were absent for that reason.

Hillyer worked his ususal shift on Monday, April 12, and worked approximately one-half of his shift on April 13. Hillyer's testimony that nothing was said to him by any official of Respondent about being absent from work on April 9 is uncontradicted.

About halfway through his shift on April 13, Carlton approached Hillyer and handed him a letter which was dated April 13, addressed to the Union and signed by Carlton. It stated:

> We wish to inform you that Gary Hillyer is being terminated from his employ with this Company, for a dishonest act. On Friday, April 9, 1982, he called in "sick," when in fact he was not.

Carlton then curtly told Hillyer, "Pack your iron [tools]. You can leave it on the hill or you [can] take it with you. If you're leaving it here, sign this paper stating that we are not responsible for damage or theft." Hillyer told Carlton that he would take his tools with him. With that, Carlton turned and left. Carlton could not remember what occurred at the time that Hillyer was terminated.

Following his discharge, Hillyer filed a grievance with the Union. It proceeded through the grievance proce-

[8] Willis did not testify. Poplin was called by the General Counsel and identified a statement he prepared about a week after Hillyer's termination saying that Hillyer had stated that he was going to call in sick on April 9. Poplin had only a vague recollection of his conversation on April 8 with Hillyer and had no recollection of telling Willis about the April 8 remark by Hillyer until asked by Willis "a couple weeks [later]." Poplin said that Willis told him that "Aldo and Carl" had asked Willis if Hillyer had said anything while he was at Sierra. Poplin candidly acknowledged that he had previously told the General Counsel that if Respondent asked him to he would lie for Respondent because it is one of Sierra's major customers.

dure to the arbitration step. According to Hillyer, he was informed by Rice when he inquired about the progress of the grievance that the Union was not going to "waste their money or their time" on him and that Rice told him to get out of his office. De Mille acknowledged that the grievance was not processed through arbitration. He said the Union felt it lacked merit because "a witness [meaning Poplin] produced a statement—an outside witness." Nevertheless, De Mille acknowledged that Hillyer had asserted during the processing of the grievance that he had seen a doctor after his absence from work on April 9, and that the doctor had provided him with a disability slip. De Mille said he had never asked to see the disability slip.

C. *Additional Findings and Conclusions*

Section 8(a)(3) and (1) of the Act are violated if an employer discharges or otherwise discriminates against an employee because of the union activities of its employees. *Great American Sewing Co. v. NLRB*, 578 F.2d 251 (9th Cir. 1978); *NLRB v. El Dorado Club*, 557 F.2d 692 (9th Cir. 1977); *NLRB v. Coast Delivery Services*, 437 F.2d 264 (9th Cir. 1971). Absent unusual circumstances not relevant here, the crucial determination which must be made in cases involving discrimination within the meaning of Section 8(a)(3) of the Act is factual, i.e., what is the actual motive for the employer's action which the General Counsel alleges to be discriminatory? *Panchito's v. NLRB*, 581 F.2d 204 (9th Cir. 1978); *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725 (9th Cir. 1969). Direct evidence of an antiunion motive is rare and, for that reason, reliance on circumstantial evidence and the reasonable inferences which may be drawn therefrom is not only permissible, most often it is necessary. *Pachito's v. NLRB*, supra; *NLRB v. V & V Castings*, 587 F.2d 1005 (9th Cir. 1978). It is seldom that an employer will supply direct evidence concerning its state of mind in cases of this nature which is not also highly self-serving. *Golden Day Schools v. NLRB*, 644 F.2d 834 (9th Cir. 1981); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). The fact that an employee pursues activities which are protected by the Act with less than "charismatic characteristics" does not detract from the fact that he or she is entitled to protection afforded by the law. *Glenroy Construction Co. v. NLRB*, 527 F.2d 465 (7th Cir. 1975). For an employee to lose the protection of the Act because of the language he or she uses in connection with pursuing union activities, the employer has the burden of showing that the language used is far more than merely offensive to delicate egos. See, e.g., *American Hospital Assn.*, 230 NLRB 54, 55–56 (1977), and the cases cited therein.

After Hillyer became active and vocal in the Union's preparation for contract negotiations and after he protested his night-shift transfer by filing a grievance with the Union and a charge with the Board, Respondent subjected him to a series of reprisals which finally culminated in his April 13 discharge. The General Counsel contends that Respondent's conduct toward Hillyer commencing with Moore's lunchroom meeting was unlawful because it was motivated by its hostility toward Hillyer's protected activities. Respondent asserts its conduct was lawful because the existing union agreement did not restrict its right to make job assignments such as those assigned to Hillyer on March 21 and that Hillyer's discharge was for cause, namely, "bragging" to Sierra Diesel personnel about his intention to call in sick on April 9. In addition, Respondent asserts that the March 21 lunchroom meeting was little more than an attempt by one union member (Moore) to express his chagrin to his fellow union members because of Hillyer's uncharitable charcterization of Respondent's managers as "asshole" at the Union's meeting earlier that day.

Hillyer's version of the matters which occurred at the March 21 lunchroom meeting is largley uncontradicted. The evidence provided by his credited testimony shows that his characterization of Respondent's managers as "assholes" at the March 21 union meeting was little more than an expression of exasperation toward the opposition he encountered from Rice over the contract negotiation stategy he proposed. In the setting here, Hillyer's indiscreet description of the potential bargaining table opposition is not so scurrilous as to justify the discipline which followed.

Respondent's contention that the March 21 lunchroom meeting chaired by Moore was merely a matter among fellow union members is naive and meritless. Although it is true that Moore's long-term membership in the Union made it unlikely that the employees present would gain the notion that Moore was unlawfully spying on the union meeting, Moore's remarks to the employees on this occasion show that he was acting in a supervisorial role. It is uncontradicted that Moore, among other things, questioned those present as to whether they had designated Hillyer to represent them and he followed this inquiry with an open attack on Hillyer in front of the other employees wherein he: (1) threatened to suspend Hillyer and any employee found talking with Hillyer; (2) threatened Hillyer with reprisal for any work errors; and (3) attempted to denigrate Hillyer by reassinging him from his usual job as a diesel mechanic to an isolated work area and by assigning him the particularly undesirable job tasks of cleaning the steam docks. The scope of Moore's reprisals does not permit the conclusion that this pique resulted solely from the "asshole" remark. Rather, the fact that Moore undertook to isolate Hillyer by assigning him to the demeaning tasks of cleaning the steam dock and working in the bone yard, and by otherwise holding him up to ridicule before the other employees, leaves no doubt that Moore's purpose was to discredit Hillyer's militant leadership in preparation for negotiations. Accordingly, I find that the General Counsel has sustained the burden of proving that Respondent violated Section 8(a)(1) of the Act as alleged in the complaint with the exception of the surveillance allegation discussed in more detail below. Additionally, I find that the General Counsel has likewise sustained the burden of proving that Hillyer's assignment to the odorous and onerous task of cleaning the steam docks violated Section 8(a)(1) and (3) of the Act, as alleged, especially where, as here, Respondent made no effort to contradict Hillyer's assertion that the job was undesirable or to demonstrate

that others had previously been assigned to this work on a steady basis.

With respect to the General Counsel's contention that Moore's remarks were designed to give employees the impression that their union activities were under surveillance by Respondent, it is my conclusion that evidence here does not merit such a conclusion. The General Counsel relies on *Keystone Pretzel Bakery*, 242 NLRB 492 (1979), and *Consolidated Edison Co.*, 305 U.S. 197, 230 (1938), in support of this allegation. The former deals with remarks by a corporate president identifying an active union employee in an unorganized plant and the latter deals with "industrial espionage" by "outside investigating agencies." Involved here is a shop foreman who rose to his present position through the ranks and who has always been a union member in a plant which has long been organized. Although the evidence shows that Moore reacted to what he was told had occurred at the union meeting on March 21, by invoking his supervisory authority, the inference which the General Counsel seeks to have me draw that Moore's remarks could reasonably lead employees to believe that he was engaged in a scheme of carefully tracking employee union activity is simply not warranted. The fact that Moore had been a member of the Union for a long period and had remained a member even after becoming a supervisor is sufficient to negate the usual inference that a supervisor is unlawfully watching or attempting to lead employees to believe that he is watching their union's affairs. This is so even though Moore responded to an inquiry as to how he learned what had gone on at the union meeting by saying that he had "informants." The latter remark in its context was little more than Moore's way of telling Hillyer that he had no intention of identifying the individual or individuals who had discussed the meeting with him. Accordingly, I find that the evidence here does not demonstrate that Moore's remarks were designed to create the impression that employee union activities were being watched by Respondent or that, under the circumstances present here, employees would readily or reasonably gain that impression. *Times-Herald*, 253 NLRB 524 (1980).

Turning to Hillyer's April 13 discharge, it is evident that the General Counsel established a strong prima facie case. Thus, it was established that Hillyer was engaged in protected concerted activity in connection with the Union's preparations for contract negotiations and that certain of Respondent's supervisors harbored considerable animus toward Hillyer because of these activities, because of his protests through the Union and the Board, and because of his sudden transfer to the nightshift. The timing of Hillyer's discharge is essentially contemporaneous with these other background events some of which I have found to be unlawful. Moreover, there is evidence from two separate sources (Guinta and Poplin) that Respondent was "looking for a reason" to get rid of Hillyer, an employee with 4 years of apparently satisfactory service. Additionally, Hillyer was discharged precipitously and without any effort to secure an explanation for the absence which was seized on to justify his discharge. In this posture it was essential for Respondent to come forward with very substantial evidence showing that Hillyer was discharged for cause in order to avoid the inference that Hillyer's discharge resulted from his union activities.

Respondent's evidence concerning Hillyer's discharge is unconvincing and incredible. In its brief Respondent argues that Hillyer failed to tender the written excuse which he was provided by Dr. Turney. The circumstances here amply demonstrate that action would have been a totally futile act. Certainly, since Respondent learned of Hillyer's illness it has not demonstrated an inclination to rectify its error by returning him to work. Moreover, the uncontradicted evidence shows that Hillyer had returned to work for a day and a half before he was discharged and not a single word of explanation was solicited from him about his April 9 absence. In the circumstances here, Hillyer had every right to regard his absence as excused. The sham nature of the conclusion which Carlton reached from the information he obtained over the phone from Willis is indicative that he was ready to seize on any reason to discharge Hillyer. Even Carlton's own testimony falls far short of permitting the conclusion that Hillyer was "bragging" about calling in sick as Respondent claimed in its brief, or that Hillyer lied to Carlton about this need to be absent on April 9. My conclusion that Respondent's explanation for Hillyer's discharge lacks credibility and truthfulness was reinforced by Carlton's unconvincing and hostile demeanor while attempting to justify Hillyer's discharge from the witness stand. Accordingly, I find that the real reason for Hillyer's discharge lies solely with the fact that Moore and Carlton resented Hillyer's recent militancy with the Union and that they made a conscious effort to get rid of him for that reason. The clumsy effort to mask Hillyer's discharge with his absence on April 9 only serves to demonstrate that Respondent's motive for terminating Hillyer was for some reason other than that proffered by Respondent. The only inference suggested by this record as to the real reason for Hillyer's discharge is that it was the result of his union activity. Finding as I have that Respondent's true motive for terminating Hillyer was his union activities. I conclude that the General Counsel has sustained the burden of proving that Hillyer's discharge violated Section 8(a)(1) and (3) of the Act, as alleged.[9]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The unlawful activities of Respondent described in section III, occurring in connection with the operation of Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to

[9] I reject Respondent's further argument that the Union's failure to process Hillyer's discharge grievance also indicates that Hillyer was discharged for just cause. Although I recognize that the Union is not charged with any misconduct in this proceeding, the evidence herein showing Rice's hostility toward Hillyer and De Mille's testimony that the Union dropped Hillyer's grievance on the basis of a written statement by Poplin is strongly indicative of the Union's failyre to fairly represent Hillyer. No testimony was elicited in this proceeding from Poplin which even arguably could serve as a basis for justifying Hillyer's dismissal.

labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectute the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to offer immediate and full reinstatement to Gary W. Hillyer to his former position as a diesel mechanic or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges he previously enjoyed. It is also recommended that Respondent be ordered to make Hillyer whole for the losses which he suffered as a result of his discharge found herein to be unlawful in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon as provided by the Board in *Olympic Medical Corp.*, 250 NLRB 146 (1980), and *Florida Steel Corp.*, 231 NLRB 651 (1977). And see generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). It is further recommended that Respondent expunge from its records any reference to Hillyer's unlawful termination and that Respondent notify Hillyer in writing that it has done so and that this matter will not be used as a basis for future personnel actions against him. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it is recommended that Respondent be ordered to post the notice to employees for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and Respondent's obligation to remedy its unfair labor practice.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating and threatening its employees because of their union activities, Respondent violated Section 8(a)(1) of the Act.

4. By assigning Gary W. Hillyer exclusively to more onerous jobs cleaning the steam docks and the working without assistance in the Respondent's yards, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By discharging Gary W. Hillyer, Respondent violated Section 8(a)(1) and (3) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Disposal Investment Inc. d/b/a Silver State Disposal Company, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees or assigning employees to more onerous jobs in order to discourage activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers of Local 631, IBTCWHA.

(b) Coercively interrogating or threatening employees about their activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Local 631, IBTCWHA.

(c) In any like or related manner interfering with, restraining, or coercing employees because they choose to engage in activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Local 631, IBTCWHA, or discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in that labor organization except to the extent permitted by an agreement described in Section 8(a)(3) of the Act.

2. Take the following affirmative action in order to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to Gary W. Hillyer and make him whole for the losses he suffered as a result of the discrimination against him in the manner specified in the section above entitled "The Remedy."

(b) Expunge from its records any reference to the unlawful discharge of Gary W. Hillyer from its files and notify Hillyer in writing of this action and that evidence of this unlawful conduct will not be used as a basis for future personnel actions against him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that those allegations of the complaint which the General Counsel failed to prove be, and the same are, dismissed.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee for engaging in union activities or otherwise exercising any of the rights guaranteed by Section 7 of the National Labor Relations Act.

WE WILL NOT assign employees to any particular job in order to retaliate against the employee for engaging in union activity.

WE WILL NOT coerce you by questioning you or by threatening you about your union activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Gary W. Hillyer immediate and full reinstatement to his former job or, if his job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings incurred from being unlawfully terminated, with interest.

WE WILL expunge from our records any reference to Gary W. Hillyer's unlawful discharge and WE WILL notify him in writing that this action has been taken and that evidence about his unlawful discharge will not be used in any future personnel action.

DISPOSAL INVESTMENT, INC. D/B/A
SILVER STATE DISPOSAL COMPANY